

APPENDIX C

- C. (1) Response by the Montana Public Defender Commission to the Draft Assessment of the Initial Operations of the Montana Statewide Public Defender System. August 21, 2009**

MONTANA PUBLIC DEFENDER COMMISSION



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August 6, 2009

Judge Shelvin Singer (Ret.), Team Leader
Marshal Hartman, Jim Hennings, Caroline S. Cooper & Joseph A. Trotter, Jr.
Criminal Courts Technical Assistance Project
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RE: Response by the Montana Public Defender Commission to the draft
Assessment of the Initial of Operations of the Montana Statewide
Public Defender System; TA Report No. 4-072.

Dear Judge Singer, Mr. Hennings, Mr. Hartman, Ms. Cooper and Mr. Trotter:

We send this letter is in response to your recent draft assessment of the
Montana Statewide Public Defender System.

1. Introduction.

First, the Montana Public Defender Commission profoundly thanks you, the
CJA Criminal Court Technical Assistance Project and American University for
your prompt, thorough and knowledgeable response to the Commission=s request
for an assessment. We fully recognize you, like us, have only limited resources
available. Nevertheless, you have provided us with an invaluable critique which
will serve as a road map for moving the system toward the delivery of quality
services for indigent defendants.

Second, as articulated in your report and by the evaluators who attended our recent Helena Commission meeting, your report focuses on shortcomings of the current system. Just as we are dedicated and committed to thoroughly reviewing and addressing the concerns of the evaluation team, the Commission also believes it is paramount the evaluation be placed in an appropriate context. The Commission is proud of Chief Public Defender Randi Hood, staff, and contract attorneys for creating a flagship, statewide system out of a largely dysfunctional and unconstitutional county-based system. Defender leaders across the state and nation expressed their profound skepticism that such a transformation could be undertaken in such short time. We look forward to continuing to oversee the system as we strive for greater excellence, while we also celebrate the herculean tasks that have already been successfully completed by PD staff and leadership.

We acknowledge that we share a strong commitment to providing quality legal representation to the disenfranchised while ensuring the legislature, administration and the tax payers that this is done in a cost-effective manner. Accordingly, we take no offense when you point out mistakes we have made and steps we have failed to take. Instead, we have taken most of your observations and recommendations to heart. Conversely, we sincerely hope you will take no offense when we disagree with your observations, analysis or recommendations. We are confident that you will view our response in the same light that we have viewed your assessment. We are optimistic that our comments and analysis can only serve to improve your already superior work product.

Third, in order to expedite the process, we have not cited all your observations and findings we feel are in error or are no longer valid due to our rapidly evolving system. If you feel the integrity of your assessment requires that level of review, please advise. We will readily comply. Please understand, however, that we may need an additional 30 days to complete that work. In the meantime, to the extent that a given finding or observation is particularly salient, we have attempted to identify what we perceive to be mistaken findings or perceptions.

Fourth, when we initially gathered information necessary to establish a statewide public defender system, we were forced to rely upon anecdotal data and opinion garnered from judges, court personnel, prosecutors and criminal defense lawyers. Often the sources of information spoke only on the condition of

anonymity. We could not help but feel that this methodology was particularly repugnant to the process of establishing a system committed to affording constitutionally guaranteed due process rights to citizens, including the right to confront one's accuser. Nevertheless, after discounting anecdotal information and doing our best to discreetly verify anonymous sources, we often used that information when making early, critical decisions.

In preparing your report, you, too, have relied upon anecdotal information. If those complaints have merit we will pursue them. If they lack merit we will publicly take that stand. Even if the information is anecdotal, at a certain point a significant number of complaints are at least a morale problem. To this end, if you are able to identify your sources, we ask you to provide them. If not, we would appreciate it if you would provide us with the number of sources for any given complaint.

Anonymous complainants may have ulterior motives. The transition our attorneys and staff have been forced to make in a very short time has been difficult for some. In addition, certain individuals would prefer a return to prior systems, or lack thereof. Through organization, training and deployment of criminal defense lawyers we have caused a never-before-experienced drain on judicial and prosecutorial resources. Our oversight exposes FTE's and contract lawyers to a review of their performance, results, and billing practices that was formerly non-existent. We are proud of our attorneys, both the employees and the contractors. Nearly all of them are as committed as we are to the social justice inherent in a quality public defender program. Nevertheless, there continue to be a very few detractors, both in and out of our ranks, who rankle at our oversight and crave a return to former times and practices without any concern for the rights of the disenfranchised. Accordingly, we have been quick to point out some of the anecdotal information that you received is either in error or premised upon our since-cured mistakes made in the rush of putting our system together.

Fifth, generally many of your observations and recommendations are premised upon our failure to create channels of communications and insist upon their implementation. When the Montana State legislature (in what can only be labeled as an act of wisdom and foresight) created this system, the Commission found itself in a position analogous to a newly-formed smoke-jumper team dropped into a forest fire. Our immediate concerns were survival and

implementation of programs necessary to meet our clients' immediate needs. When we did so, you have astutely pointed out we failed to address or poorly dealt with a number of secondary issues, most of which fall in the categories of communications and management. When we asked you to undertake the assessment that you have so competently performed, we made two errors in judgment. We underestimated the time it would take us to cure many of our communications problems, especially those due to the ongoing development of computer software. We overestimated the time it would take you to roll up your sleeves and expeditiously accomplish your task. As a result you evaluated our system when it was still in a high rate of flux. As we explain below many of your recommended courses of actions have been initiated and some completed.

Sixth, we hope to issue a more detailed response addressing substantive issues raised by you at a later date to be identified as soon as possible. When we do so, we hope to have budgetary impact projections for each of your recommendations.

With the foregoing in mind, we provide the following responses:

2. Our comments to your Observations and Findings not referenced in our response to your recommendations.

1. At page 21, footnote 10, you opine that Ms. Hood may be the only death qualified lawyer in the system. OPD advises it has three such lawyers as FTEs. We are optimistic that other death qualified lawyers may be willing to take on this onerous representation as contract lawyers.

2. While we concur with your observation that many contract lawyers are dissatisfied with the current compensation rate, we wish to avoid any tacit admission that we have failed to attempt to correct this inequity. We initially proposed funding which would have allowed the OPD to compensate contract lawyers at \$80 per hour. We provided the Governor=s office with examples of hourly rates paid to other lawyers and for various tradesmen and professional with whom the government contracts. The administration rejected budgeting at that level.

We continue to support any effort made by the contract lawyers to obtain an increase in compensation, but have concluded they must initiate a grass-roots effort to influence both the administration and the legislature. We have attempted to communicate that message informally to our contract lawyers. We were disappointed when contract lawyers failed to attend budgetary hearings in the 2009 session. There is, however, no blame to be assigned. We will continue our efforts to encourage and facilitate our contract lawyers' effort to obtain an equitable rate of compensation.

3. At page 23, you refer to evidence of failure to pay contract lawyers in a timely fashion and an erratic policy regarding the payment of late-submitted bills. The problem with late submission of bills became acute at the end of the fiscal year of 2008. Ms. Hood and Harry Freebourn, our Chief Financial Officer, had struggled mightily to succeed in balancing an annual budget of nearly 20 million dollars to within a few thousand dollars. Their efforts were placed at risk when one lawyer in particular submitted a bill for his entire year=s services at the end of June. The bill exceeded \$60,000.

The OPD had already contemplated late submissions might cause a budgetary problem and had distributed a memorandum explaining that the OPD=s recently adopted a policy that all bills were to be submitted within 45 days of performing the work for which compensation was sought. Initially, some attorneys ignored the memorandum and it was difficult to get full compliance. Accordingly, the language was then incorporated in OPD=s memorandum of understanding (MOU) sent to each contract lawyer. In the interest of public relations, initially OPD did grant some leeway when the policy was initially adopted, but simply lacked the funding to pay the \$60,000 demanded in June of 2008. The policy has now been in effect for well over a year and is implemented across the board.

Lynn McMillan, OPD's assistant contract manager confirmed she logs in every claim that comes into the Central Office. She noted that a number of attorneys do not send their claims for payment until the 45-day limit has nearly expired. She insists OPD pays all bills within 30 days of receipt, but points out this may mean some lawyers are not receiving payment until as much as 75 days after they performed their billed services. She indicates the same may also be true for mental health providers. In addition, we pay our contract service providers for ongoing work rather than delaying to the end of the case for which we are billed.

Under previous systems, most contract lawyers were required to wait until the case was closed before submitting a bill. Except in very rare cases, this remains true for CJA lawyers providing indigent defense in federal courts.

4. At page 39 you point out multiple deficiencies in our case load weighting system (CWS). In general, we agree. It is important, however, that we point out the genesis and evolution of the current case load standard. Even prior to the time the system was created, the former Appellate Defender Commission had sought insight by reviewing *The Compendium of Standards for Indigent Defense Systems* compiled by NALDA. To the extent that those standards or policies contained a weighting system, they seemed sophomoric. Later, we spent a considerable amount of time discussing whether a weighting system would be beneficial. Several opined that such a system would be too rigid. They pointed out that different lawyers work at different paces. They urged we merely adopt a standard which required compliance with ethical considerations. We were leaning toward doing just that. Then the FTE=s in the regional offices unionized. Caseload became a bargaining issue. A Labor Management Committee (LMC) comprised of representatives of both labor and management resurrected the use of a weighted case load system and has developed the current format. It is not stagnated by inclusion in annual or biannual contracts, but may be a bit slower in developing because: (1) it is now a LMC product; and (2) we have been unable to find other successful models for guidance.

Since 2007, a PDC member has attended the annual Summit of the ABA=s Standing Committee on Legal Aid and Indigent Defense (SCLAID). While a considerable amount of highly-useful information was obtained, repeated attempts to obtain currently successful CWS's failed. If there are superior formulas out there, the systems that have adopted those formulas have been very jealous with their information.

The OPD initially used a CWS in only two of its eleven offices. Ultimately, the CWS was implemented in all eleven regional offices. We found a CWS based on a calendar year case count was too stagnant. Given difficulties in getting lawyers to close case and our initial inability to track those closures in our software, we determined a system based upon cases closed might be unobtainable. Accordingly, our CWS is premised upon cases opened in the prior twelve months. OPD advises case loads for each attorney are reviewed monthly.

We note that on August 3, 2009, the ABA House of Delegates adopted the *ABA Guidelines of Public Defense Related to Excessive Workloads*. On doing so, the ABA has chosen to place its guidelines in the context of case load overloads. The guidelines, while not quantitative, urge consideration of: (1) actual case load; (2) an effective performance monitoring system; (3) adequate training; (4) regular managerial case load review; (5) prompt response to case overloads; (6) filing of motions to stop assignment of cases when a case overload occurs; (7) resistance to judicial attempts to manage case loads; and (8) appeal of any court's refusal to stop assigning cases. In light of the ABA guidelines' breadth, we may consider asking the LMC, which is developing our CWS, to actively participate in developing a plan for situations in which case overloads occur and there is no funding available to cure the problem.

We did receive some meaningful CWS information for appellate defenders from Michigan. That state has spent decades developing a quantitative CWS for appellate defenders. We sent a follow-up letter requesting a copy of Michigan=s appellate CWS in February of 2007. After receiving no immediate response, we dropped the ball. We will renew our efforts to obtain that information.

OUR RESPONSE TO YOUR RECOMMENDATIONS

Recommendation No. 1: The OPD needs to provide detailed information to adequately describe the agency caseloads, dispositional processes, attorney workload, and related data that describes the agency=s operations and services being performed.

We agree. Only in the last month or so has OPD been able to generate most of the foregoing information because its software system was still being developed and refined by a vendor. We are optimistic the delay will be well worth it. When the statewide Public Defender=s system went into effect five County offices had computer software. Three of them had JustWare. The JustWare used in those offices was not completely compatible. We reviewed various software options and, after lengthy discussions with personnel from JustWare and from County Offices, decided to stay with that system. At the time, JustWare may have been adequate for a county defender office, but was inadequate to meet our needs.

JustWare personnel promised that they would fashion evolving software which would ultimately meet all of perceived needs. OPD advises that now has been accomplished. We have asked for a demonstration at our next meeting.

Just Ware was functioning at a much lower level when you sent representatives into the field than it is now. Initially, OPD=s IT personnel focused on tracking basic case data, then the opening of cases, and then case closures. The system has now expanded to include fields which include dispositional data. While dispositions were previously tracked inside the system, they were tracked in case notes and not retrievable by a random search. Should it become important, the dispositional information could be retrieved, but would require IT personnel to sort through the disposition notes of each computer file entered into the system prior to the time that dispositional data was assigned a specific field. At this point we feel that effort would be counter-productive.

Prior to making the decision to commit to Just Ware we did attempt to determine whether any other public defender system was using superior software. After inquiries at the ABA SCLAID summit only Emmet Bonderant, Chairman of the Georgia Public Defender Standards Council, believed his system=s software, JCAT, might be superior. Our IT personnel communicated with Georgia=s personnel. JCAT did not appear to be a viable option. We should also note that JustWare has provided their services and helped us to develop the requisite computer software at a very reasonable rate. To date, we have paid them approximately \$184,000.00. This figures pales when compared to other software options.

OPD reports the time records you found lacking are now contained in electronic data. OPD advises us the supervisors of line attorneys have been receiving monthly reports for quite some time. Those supervisors, or their staff, also oversee implementation of the CWS. The system produces several dozen report variations which were developed in the past 8 months.

With respect to staff attorneys having too many cases, OPD now provides the Commission Case Weighting reports on an Excel worksheet developed by the LMC. While our evolving CWS is likely inadequate, those reports indicate no attorney carries a case load exceeding that set forth in the CWS.

OPD also advises that if the CWS fails, especially because a given attorney may be taking multiple cases to hearing or trial (a weighting parameter that has not yet been included in the formula) adjustments are made regionally after a consultation with management personnel. Managers now report to line attorneys on a weekly basis. The informational conduits will be further refined as the JustWare system evolves. OPD also reports some FTE=s may perceive they are handling too many cases because they previously worked in county offices where the caseload was somewhat lower.

Your report makes reference to Asubstantial evidence@ to the contrary. If that information was provided in confidence, we understand your reluctance to disclose it. On the other hand, if the source of this evidence could be made available, it might be of assistance to the OPD and us in resolving actual problems or staff attorney misconceptions. We note that we have also received an anonymous report from someone no longer in the system that one regional manager may have distorted monthly CWS reports in order to reflect compliance. We will follow up on that report immediately.

Additionally, Just Ware now has a time-tracking component. The OPD reports, however, that the data currently being generated remains somewhat suspect. The problem is staff attorneys sometimes fail to input the necessary data. This problem arises for two reasons:

- (1) A resistance by staff attorneys to tracking their time. Most attorneys were not required to track their time in county FTE offices. Some staff attorneys may have a sense we are requiring them to perform unnecessary administrative tasks when they wish to focus on client representation;
- and
- (2) A lack of staff attorney training.

We hope to cure the former problem by continued encouragement to comply and explaining the importance of the data to successfully managing case loads and providing the data as an essential element to our requests for budgeting.

We hope to resolve the latter problem through training. As we mentioned in our latest meeting with you, the training program developed by the OPD has been nothing short of impressive. The three private attorneys currently on the Commission can recall the very limited continuing legal education opportunities for criminal defense lawyers in this state two decades ago. In most years, the only CLE available was an annual one-day criminal law State Bar seminar attended by both prosecutors and defense counsel. In the last decade the creation of Montana Association of Criminal Defense Lawyers and that association's CLE presentations improved the situation, but there were still substantial educational needs not being met.

Accordingly, OPD initially focused its training on substantive and procedural criminal law. We have taken your concerns to heart, however, and have asked the training officer to work with IT personnel to develop JustWare training component to his curriculum. This task was completed within days of the July Commission meeting and a schedule has been developed that focuses on an intensive training effort. In short, we believe that the system is in place, the data base loaded, and basic reports written. Now the focus needs to switch compliance and intensive training.

In summation, we agree with your recommendations and have already taken steps to implement most of them. While we cannot precisely quantify the amount of financial resources required to reach these goals, we estimate the cost will be in the low tens of thousands.

Recommendation No. 2: The case weighting system should be refined to provide a meaningful reflection of the work entailed in handling different types of criminal cases.

We agree. As mentioned above, we have not found a CWS used in another defender system that is of any use. Accordingly, we are creating one. While FTE contracts are negotiated annually, the CWS is not incorporated into annual contracts. Instead, a Labor-Management Team periodically meets and discusses ways to improve the CWS. Our committee approach to developing a more specific CWS may result in a slower evolution, but we feel that it will result in a more

accurate system. Additionally, we perceive that, if there is a low morale among contract and staff attorneys, it arises from a feeling they are disenfranchised. Due to the compelling need for expediency in setting up this system virtually over night and the need for staff and contract lawyers to focus on adapting to the new system, we took a many steps without the benefit of substantial input from the contract lawyers and FTEs ultimately affected. We hope staff input into the CWS development will improve morale.

We are optimistic that recent refinements in Just Ware will also provide us better insight when modifying the CWS. This is especially true because our system will now be able to track the procedural history of a case.

Recommendation No. 3: A meaningful system should be developed for evaluating the work of lawyers.

We agree whole-heartedly. While many of our errors have been errors of omission, this is an area in which we have acted, but have done so poorly. We discussed this recommendation both at the most recent meeting and in a later telephone conference. We will take immediate steps to generate new forms and better procedures for evaluation of all personnel in the system ranging from administrative staff to the Chief Public Defender. OPD reports forms have been recently developed and sent out for review which place further responsibility on regional managers.

OPD also reports most individuals who have left the system participated in exit interviews, but many have been reticent during those interviews. We plan to formalize the process by developing an exit interview form. One of our commissioners recommended we require departing employees to sign those forms. We would then offer the employee a copy and include a box on the form indicating whether the employee accepted that offer. That form is being developed on a Commission level because one of us has some expertise in this field. The form will then be sent to OPD Human Resources personnel for review and comment expeditiously.

The development of evaluation procedures for FTEs is done through the LMC. The only additional costs for refining that portion of the evaluation system

will be those incurred in getting those people together: i.e., travel, lodging and per diem. That committee, of course, already incurs costs when meeting for other purposes. Accordingly, we estimate our compliance with this recommendation will result in only minimal costs.

Recommendation No. 4: At a minimum, budget submissions should be supported by documentation describing the agency=s accomplishments presented in concrete terms.

Again, we agree. Mr. Freebourn has an extensive history with the legislature during which he garnered the respect of both elected and appointed officials. He has been invaluable to the OPD and PDC in compiling the information he had available and explaining to us how we needed to be submit it in compliance with protocols developed by the administration for all state agencies. To some extent, that protocol limits our ability to provide as much information as we would liken a final report to the legislature. The underlying data for that report, however, has been communicated both to the administration and to legislators on an informal basis. We have gathered all documentation available to support our budget requests and have used it in meetings with the Administration's Budget Office, individual legislators and during legislative hearings. We have no control, however, over the duration or agenda of legislative hearings, including the information we are asked to present. The budgeting submission process is actually controlled down to the number of lines of data that can be submitted. The legislature and its staff set those parameters.

While we have been able to generate sufficient information showing our caseloads have increased significantly even in the short time that the system has been in existence, we will now be able to provide far more information regarding increasing demands on our resources. We are to submit our agency budget next May. That process, however, begins in November. In fact, that process has already begun. Beyond the efforts made by Mr. Freebourn on an ongoing basis, your author met with the Governor=s Budget Director, David Ewer, this week. Mr. Ewer was good enough to take the time to allow your author to explain why there is a distinct possibility that the system will require additional funding and to give Mr. Ewer our continued assurances we will do everything in our power to avoid such a request.

It is important for you to know that Mr. Freebourn sent you only the summarized information that was ultimately presented to the legislature. He and the Commission agree whole-heartedly with the final sentence of your recommendation that supporting information for budgeting should be categorized by type of case and provide case results, caseload and case positions for each lawyer. While we doubt that the legislature will permit that much information in our final report, we will provide that information to anyone interested. JustWare will now allow us to do so.

Finally, it is important to note the state funds county prosecutors and peace officers only indirectly. Accordingly, similar information is not being provided to the legislature by prosecution offices or law enforcement agencies. The legislature agrees every two years to supplement county prosecution and law enforcement budgets, but the data upon which that bi-annual decision is made is woefully lacking in comparison to the data we have generated in the past and will pale all the more in comparison to data we are now capable of providing.

Finally, we do not perceive our compliance with this recommendation will require any more than minimal financial expenditures.

Recommendation No. 5: The minimum caseload statutory requirement for the Chief Defender, contract manager and regional deputy directors should be reduced or eliminated.

We agree only partially. Ms. Hood continues to believe it is important for her and for managing attorneys to continue to carry a caseload. She suggests any reduction in management caseload should be done on an *ad hoc* basis because the system needs to remain dynamic. She points out that managing attorneys in less-populated regions would have very little to do if they did not carry a caseload. Ms. Hood continues to enjoy the highest of credibility and admiration of the PDC. We are inclined to defer to her judgment once the evaluations for all attorneys are completed and the management issues you have identified are addressed. Until that time, we will consider eliminating cases for the Chief Defender, Training Coordinator, and Chief Contract Officer, and significantly reducing caseloads for all Regional attorneys, managing attorneys, and for the Chief Appellate Defender.

We will ask Mr. Freebourn to prepare his estimate of the cost associated with taking that step. We are concerned we lack the funding to do so.

On the other hand, it is clear our management problems arise from the fact that managers lack the time to do their job – manage. We will do what we can with the fiscal resources available to allow them time to fulfill that task. If an attorney with management duties refuses to adequately perform all of his or her management tasks, then, of course, we will need to either replace that attorney or insist providing additional management staff to insure that priority is met.

We certainly agree that caseloads for managers need to be controlled as management roles and the time required to produce and utilize the information we are now able to generate increases. Ms. Hood has informed us many management lawyers have already cut back in order to meet those goals. On the other hand, she reports some managing attorneys simply do not wish to reduce their caseload. No single factor causes this reluctance. Personality, experience, and attorney competence all play a role. Accordingly, we believe that we should actively seek input from the regional managers before amending this Standard. OPD has recently produced current case loads with full descriptions for all managers. We have asked them to provide historical data in order for us to analyze the information to determine trends. OPD advises it will do so, but will require more time than a timely response to your report allows.

While your recommendation does not address minimum case load requirements of the Appellate Defender, Chief Appellate Defender Jim Wheelis opined it is foolish to expect the chief appellate defender to carry a standard case load. He recognizes he is less efficient than many other attorneys and could fill a complete FTE just dealing with questions from the field, reviewing and preparing petitions for writs, dealing with personnel problems, and reacting to the many problems that arise. Accordingly, he feels his briefs suffer.

In a great part, this is a monetary issue. Full compliance with your recommendation would be very expensive. While we have not yet asked Mr. Freebourn to quantify the cost, we project we would need to request a double digit increase in our number of FTEs and a several hundred thousand dollar budget increase. Any reduction in case loads for managers will likely be a significant expense.

Recommendation No. 6: The Commission must be more aggressive in demanding comprehensive, reliable reports of agency activity.

We agree only generally. Certainly there is a need for additional data as it becomes available. We are confident OPD will generate that data and provide it to us. In general, however, we are comfortable with the level of information that OPD has provided. Some of that information may have been conveyed only verbally or informally, but this is a reflection of our unanimous opinion and experience that OPD staff is credible, competent, and responsive to our requests for data on any level. Certainly, we have lacked information which would have been valuable, but that lack of information is a result of delays in the assimilation process and software development. We are confident OPD is providing us with all relevant data in a timely fashion.

Recommendation No. 7: A separate Conflicts Office should be maintained for trial and appellate cases with the director reporting to the Commission, not the Chief Defender.

We are undecided on how to react to this recommendation but agree that this is an urgent issue which needs to be revisited as soon as possible. Your comments are astute. This is one of only a few of your recommendations based upon your perception that we have acted incorrectly rather than failed to act at all.

As Judge Singer noted, at one point we did hire a separate conflicts administrator for the assignment of district and lower court attorneys. Later we were advised enabling legislation might not have granted us authority to engage the services of a conflicts administrator. This issue again became the primary point of discussions at multiple meetings. We terminated the employment of the conflicts administrator and developed the current system. Under the current system each of the regions is considered an independent law office. Case files are not shared. Each region is managed by an independent management staff. Ultimately, however, employees and staff of those regions are paid by and answer to the central office. Clearly, the central OPD office performs more than just a management function C personnel in that office also practice law.

We debated this issue at length. We terminated our debate only because it was essential that we address other compelling business. Now that we have some time for introspection and have received your insightful and independent observations, we will give this topic a high priority. We based our decision to operate in the current fashion, in part, on an opinion of the Attorney General regarding a potential conflict in a county public defenders office. The hypothetical presented was very similar, but not exactly the same as the system that we have now created. In spite of the express language in Rule 1.8 of the MONTANA RULES OF PROFESSIONAL CONDUCT stating that a conflict for any attorney in a firm applies to any other lawyer in the firm, the Attorney General opined there was no conflict existed. Your position that our current system is not ethically viable, however, gives us the gravest of concerns. Given the fact that the entire OPD system operates under one central office and the State Bar of Montana's ethical mandates, your observations and recommendation may be correct.

We have already initiated a query to determine whether we were correct in our belief that we do not have the power or budget to hire a Conflicts Administrator. To some extent, our decision will be based upon the answer to that question. We have also discussed the possibility seeking an ethics opinion from bar counsel. One commissioner has already contacted the State Bar Ethics Committee. They advise that it would take three months to respond and reminded us their opinion is only just that, an opinion rather than a binding legal authority.

On an appellate level, Mr. Wheelis reports if his office reviews a case and perceives that an IAC claim is warranted, whether or not the client has raised the issue, the conflict issue is resolved on an *ad hoc* basis. Sometimes the case is assigned to conflict counsel, but usually the case is retained in-house. Record-based IAC claims are presented on appeal, not through post conviction relief. Since the Appellate Defender Office does not know whether an appeal will involve a record-based IAC claim except in rare cases, when it finds such an issue, it has no satisfactory way to deal with it. Sometimes trial counsel will include an IAC issue, but that happens only rarely. Few trial attorneys warn the Appellate Defender that they may have acted ineffectively. If forewarned, the Appellate Defender can decide whether there is a conflict that requires hiring contract counsel. If trial counsel was not with a regional office, then the Appellate Defender does not see a conflict. If counsel was or is with a regional office, the

Appellate Defender usually sends the case out if it knows about the problem in time. But it usually doesn't.

When the OPD first started, almost all record-based IAC issues could be raised without fear of conflict because trial attorneys had not been part of the OPD. Now, after 3 1/2 years, that is not the case. Most appeals involve OPD cases. The Appellate Defender reports it has too much contact with field offices to allow the assertion of independence even if it was not under the supervision of the Chief Public Defender like all the field offices.

Mr. Wheelis finds the current system unsatisfactory and opines that neither the regional system nor the appellate system will survive a challenge. He suggests the need for statutory changes such as creating a wholly separate appellate defender officer under some other agency. If that were accomplished, he feels there would be a need to duplicate services, such as preparation of writes and general research because those tasks benefit highly from a centralized office responsive to all regions. A centralized office allows researchers and writers to identify patterns and trends beyond what a person based in regional or local offices sees.

In addition, we've discussed the propriety of filing an original proceeding in the Montana Supreme Court asking for declaratory judgment. Finally, it may also be that the steps necessary to implement our decision are beyond our control. If the legislature needs to cure the problem, we will immediately alert the Interim Committee on Law and Justice.

This is one of a few of your recommendations that could have serious financial consequences. All other viable options would be more expensive. Once we determine our options and those of the legislature, we will ask Mr. Freebourn to provide financial projections for those options.

Recommendation No. 8: The Training Director should regularly survey staff and contract lawyers to determine what training they believe is needed.

We agree. OPD advises this is currently being done. Management, staff and contract lawyers are frequently consulted regarding what training is needed or desired. As touched on above, to state those programs are better than what existed

prior to the creation of this committee would damn them by faint praise. While there is always room for improvement, the OPD training director, Eric Olson, has done an outstanding job in setting up a training program that is impressive in its numbers, remarkable in its breadth, and notable for the quality of presentations made. The vast majority of those programs have been videotaped. They are available for review by all FTEs and contract lawyers. While we have taken to heart your recommendation that communications within the system need improvement and have, therefore, initiated incorporation of IT training into the current program, it is difficult to fault the program in any other way. We will suggest to the OPD, however, that it consider adopting some sort of electronic form to solicit input on future training.

Recommendation No. 9: Each training program should have systematic feedback and evaluations from attendees.

We agree. OPD advises this is being done. In the foregoing paragraph we committed to developing an electronic (as opposed to written) form for input based upon our experience with written evaluation forms. OPD has found that lawyers often neglected to fill out written evaluation forms. Accordingly, OPD initiated a process sometime ago wherein each attendee for each training program is required to submit an electronic evaluation form to the central office. OPD does not give a lawyer credit for continuing legal education until the lawyer has submitted the electronic form. This protocol has resulted in virtually 100% compliance with completion and submission of evaluation forms. OPD assures us that once the evaluation information is obtained it is inputted onto a spreadsheet monitored by the central office and provided to Mr. Olson and his staff.

Recommendation No. 10: At the very least the following activity should be a part of the training functions:

(A) The training office should prepare and distribute a separate trial book applicable to each category of case, e.g. misdemeanor, felony, appellate, juvenile, etc.

We agree, but suspect this will require a considerable amount of time and effort on behalf of the Training Officer. We are very interested in any examples of sample trial notebooks currently held and maintained by other public defender

systems. If you have such examples or would be able to refer us to a system that has been using categorical trial notebooks, we would be grateful.

(B) The Training Director should be responsible for developing and implementing programs through Public Defender manager two introductory programs:

First: an orientation program for all new staff including an introduction to office processes and policies.

Second: an initial skills program for the attorney staff to introduce the attorneys to their professional duties.

The OPD advises it currently has an orientation program relating to state processes, policies, and employment. The OPD also conducts an annual seminar for new attorneys at a modest state forestry facility near Missoula, Montana. That program covers everything from how to dress, to trial notebooks, to the nuts and bolts of preparing for and trying a case. Some Commission members have presented at that program. Only new contract lawyers or employees who have substantial experience are exempted from attendance. 20 employees and 1 contract lawyer attended the most recent program held this month. We will forward a copy of the curriculum by separate mailing.

(C) The training director and the Appellate Division are developing a brief bank. That activity should continue and periodically be upgraded.

We agree. OPD advises they continually upgrade the brief bank. Mr. Wheelis advises all OPD appellate briefs are available in searchable form through the State Law Library. Having so advised, however he has resisted getting involved in the brief bank. He points out his office doesn't have trial briefs and motions except for a few limited to appellate purposes –e.g. a petition for an out-of-time appeal. He advises the current funding level leaves him with too few staff to respond to core duties in a timely fashion, much less police trial motions and briefs. He notes that his office already deals with questions from the field and usually acts as a gatekeeper on petitions for writs. Neither of the foregoing is in the Appellate Defender's statutory list of tasks, but both have proved to be unavoidable duties.

Mr. Wheelis estimates he would need two more FTE's to effectively contribute to a trial brief work bank. Without them, he lacks the resources to get involved.

(D) Every continuing education training program should continue to be recorded and the recordings made available to lawyers.

We agree. OPD advises this is currently being done. We consider the electronic preservation of training programs to be particularly valuable for rural and new attorneys.

(E) A monthly newsletter summarizing recent noteworthy decisions from higher courts and of any changes in Agency policy and procedures should also be prepared and distributed.

We agree that the newsletter is a valuable informational conduit and training medium. We disagree that it should be monthly. OPD advises they have sent out only three newsletters to date, but are now committed to produce a newsletter quarterly. This practice is consistent with that of the Federal Defenders of Montana who also circulate a letter on a quarterly basis. We do not intend to require OPD to increase the frequency of the distribution of its newsletter unless staff or contract lawyers request it.

Recommendation No. 11: An evaluation procedure for lawyers needs to be developed which is timely, is based primarily on objective data, and promotes the lawyer=s professional developments over the next year.

We agree. This is another work in progress. We acknowledge our current evaluation forms are lacking and evaluations which should have been done have not. We contemplate, however, that compliance will result in significant expense. We will need to insist our managers perform meaningful and regular evaluations. In order to do so, their case loads must be reduced or other personnel will need to be hired to assist them. We have not yet attempted to quantify this cost, but will ask Mr. Freebourn to do so.

Recommendation No. 12: Special procedures should be developed for evaluating contract lawyers, relying primarily on the information provided in the proposed closing documents.

We agree. Some of the information required to effectively evaluate our contract lawyers is only just now becoming available through JustWare. Our evaluation of contract lawyers has also been delayed by our need to address many other problems overseeing contract lawyers. Creation and development of a memorandum of understanding (MOU) has been an ongoing and contentious task to which we assigned a high priority. After fine tuning the MOU, we continued to experience difficulty in obtaining signatures by the lawyers with whom we contract and compliance with the terms of the MOU. Many of the contract lawyers to whom we assign cases are the only lawyers geographically available to take those cases. This dearth of human resources has put us at a disadvantage in attempting to ensure compliance with adopted standards and policies. Confronted with these issues, we've failed to develop a meaningful evaluation system. We will do so.

We anticipate expenses associated with this recommendation will be moderate. Again, we hope to have a financial projection when we next write you.

Recommendation No. 13: A contract lawyer should be prohibited from having an assigned client become a fee client in the originally assigned case.

We agree. Our oversight in adopting and implementing a standard is embarrassing. Prior to our July meeting it became apparent that we had inadvertently failed to formally adopt a drafted and reviewed standard regarding situations in which clients who have retained counsel become indigent and clients who have been assigned counsel later have funds to retain counsel. We resurrected the language and intend to adopt it. We note, however, that the standard assumes assigned counsel will not charge a fee and will report a client's changed financial status to OPD. We will amend our proposed standard to specifically restrict assigned counsel from charging a fee and requiring retained counsel to report a change in a client's financial status so that OPD can be reimbursed. We will probably include the standard in the text of the MOU's

signed by each of the contract lawyers. We should incur minimal cost in adopting this recommendation.

Recommendation No. 14: An emergency lawyer should be available 24 hours seven days a week to ensure immediate provision of counsel and compliance with the Commission standards.

We agree this recommendation is a laudable goal. However, it is simply not attainable in many regions due to the sparse population and great distances between the lawyers with whom we contract and the detention centers in those regions. We intend to address your recommendation, but doubt that we will come to a resolution that fully complies with your suggestion. Full compliance would be very expensive and fiscally irresponsible.

Recommendation No. 15: Management staff should develop a plan for situations in which case overloads occur, particularly when they coexist with budget shortfalls.

We agree, but suspect our perspective on what the plan should look like differs from yours. Our system is one of only a few systems operating in states that have a budget surplus. While there are arguably some logistical difficulties with the fact that we are assigned to the Department of Administration for organizational purposes, that assignment has allowed us a high level of dialogue with the Governor and his budget staff. In the past, we have anticipated budgeting shortfalls. Those shortfalls have been addressed through discretionary funding increases afforded us by the Administration. We also have the option of requesting to spend money from the second year of the biennium in order to meet expenditure shortfalls in the first year. Your author met with the state budget director this past week. The director assured me the administration will continue to work with us if there are budgeting shortfalls. He was adamant that we approach the administration for supplementary budgeting before taking any steps to reduce statutorily or constitutionally mandated services to the disenfranchised.

Accordingly, we anticipate developing a plan addressing the manner in which we would reduce services or shut the system down completely, but do not

consider it high priority at this time. As mentioned above, we may consider asking the LMC to create an initial draft. If you are aware of contingency plans that have been developed by other states or agencies that you find exemplary, we would very much appreciate it if you could provide us a copy or direct us to individuals who might do so.

On a regional level, OPD advises it has established projected regional budgets, but does not hold the regions to those spending limits. OPD also advises that they have developed a reserve central fund in order to address special issues arising in the various regions.

Finally, we intend to explore the creation of a major crimes unit. We anticipate the development of that unit could improve delivery of legal representation to our clients while also resulting in cost savings.

Recommendation No. 16: When caseloads of staff lawyers are at maximum levels for assuring effective levels of service and contract lawyer resources are exhausted, the Defender Agency must refuse to accept more cases.

We agree. The ABA Standard and the ABA ethics opinion issued in 2007 mandate such a response. We are optimistic that we can avoid such a crisis in the next few years. Currently, our attorney case loads are lower than in the states in which a shutdown of public defender services has occurred. We will diligently work to maintain or reduce current levels.

Recommendation No. 17: Budgeting for the 2012-2013 biennial legislative session should begin immediately. Among the specific requests to the Legislature should be the following:

- a. *An increase in the contract lawyer hourly rate to at least the federal court rate for appointed lawyers.*
- b. *Action to ensure that the salaries of defender staff attorneys are on a par with salaries of other state employed lawyers.*

We agree. We remain optimistic the information contained in new computer fields and analysis of that information will allow us to generate and provide credible data to support our budget request to a legislature which passed the remarkable legislation which created our system. Your recommendation that we should seek an hourly rate increase for contract lawyers to at least the federal rate for appointed lawyers is certainly a laudable goal. As mentioned above, however, we anticipate we will experience difficulty in obtaining increases in hourly compensation for contract lawyers without a groundswell of support from those lawyers. This area of funding will have the single biggest impact on our budget. Each \$10 increase in hourly compensation to contract lawyers will result in approximately a \$1 million increase in our annual budget.

Your recommendation regarding salaries of defender staff attorneys is currently being addressed primarily through negotiations with union personnel who represent them. Collective bargaining with the unions resulted in establishing a pay ladder with the state that has helped considerably with the FTEs' compensation. Our effort to obtain an increase in pay for FTE's was rejected by the administration and legislature. A state-wide limitation on salary and wage increases was imposed. Our efforts to explain that because our system was new and still in a state of transition the limitation should not be imposed on the OPD failed. Currently, the Unions have asked the administration to revisit its stance. An understanding of confidentiality prohibits us from saying more at this time. We remain optimistic, however, that the Unions will prevail

Because our system is new seniority pay comparable to other agency lawyers remains a problem. OPD advises that they are currently developing information regarding the inequity of compensation and hope to have better comparison data available in October. We will continue to point out to both the administration and the legislature the inequity of paying public defenders a salary which is lower than every other salary paid to state-employed lawyers and that many nonprofessionals or less educated professionals are paid at a higher rate or provide contract services to the state at rates that are higher than the compensation rates for our contract lawyers and FTEs.

- c. *The Aminimum@ case requirement for all managers, including the Chief Defender, should be stricken from the Defender legislation.*

We do not completely agree with this recommendation. Most of our observations and analysis are set forth our discussion regarding Recommendation 5, above. We will, of course, review the standard in reaction to your recommendation, but contemplate that we will not strike it entirely. The OPD insists that there must be some degree of fluidity based upon the personalities and situation involved. OPD will, of course, continue to monitor case loads on a monthly basis. Managers must meet their managerial duties. If evaluations are completed as required, if morale and communications problems are not an issue, then that manager will be allowed to continue to litigate. If not, then we will need to insist they step aside and become full-time litigators. As a first step, the OPD has already provided us with current case load totals and break-downs of the types for each manager. We have asked OPD to provide us with some historical data for purposes of detecting a trend. OPD advises this will take some time, but the information can be produced. We hope to have this information available when we next write you.

Recommendation No. 18: There should be a separate fund category for emergency situations. Some examples for contingency reserve funds are essential are the high profile case, instances of extreme community disorder, and other catastrophic events.

We agree. OPD advises that they have such a fund in place. Since the inception of the system OPD has set aside between \$175,000 and \$500,000 annually from its general fund to meet emergencies. Historically, those funds have been used to pay cost overruns for contractors because those expenses are the hardest to predict and control. We have been able to contain costs for mental health contract providers by establishing a protocol for performing evaluations and payment for those evaluations. That protocol alone has reduced mental health contractor payments by tens of percentage points. Even so, projecting and controlling contract services from all providers remains a problem. OPD advised it is satisfied with the size of its current reserve fund.

Recommendation No. 19: The Chief Defender should communicate with staff regularly regarding the application of policies and procedures to OPD office operations, staff compensation, evaluation, etc., as well as any proposed changes in these policies.

We agree. As repeatedly noted above, communications have all too often taken a back seat to exigencies. OPD advises its recent focus on the legislative session and budgeting has distracted the central office from what it perceives to be necessary face-to-face meetings throughout the state. Ms. Hood recognizes it is again time for her to travel throughout the state to get a firsthand sense of what the various regions are doing well and what they could do to improve.

In addition, we hope to soon conduct a review of all our Standards. We have discussed the possibility of having a contract lawyer and an FTE participate as *ex officio* PDC members when that review process is initiated,

Recommendation No. 20: The rationale for distribution of resources to Regions must be published, explained and supported by facts.

We agree. Much of this function is handled by the LMC. Nevertheless, OPD presented us with one only recently discovered reason for a perceived discrepancy. The Billings region has a greater population than the Missoula region. Predictably, Billings has reported a higher number of cases than Missoula. Nevertheless, Billings has received less funding. As it turns out, this discrepancy is caused to a great extent by the way in which Billings lower courts count their cases: each charge is considered a separate case. Courts in other regions do not do this. The OPD regional office followed the courts lead and did the same. Accordingly, Billings' case counts were substantially inflated. The OPD will now adjust the Billings regional case to make it consistent with other regions. We will ask the OPD to disseminate this information to FTE's and contract lawyers expeditiously if it has not already done so.

While communication with staff and contract lawyers should now be a priority, we suspect your concern that there is a significant deficiency in this area may arise from anonymous reports by lawyers who are not content

with the current grievance systems. Certainly, discontented employees are not unique to this system.

At our suggestion, OPD formulated and adopted a written grievance and complaint policy. We received a copy last January. In general, that policy encourages unionized employees to pursue a grievance through their union representative. It states that all other employee complaints should be initiated on as low a level as possible. The policy currently states the Chief Public Defender has the final word within the system. Given your comments about poor morale and concerns of retaliation, we will revisit this policy for purposes of determining whether it should be amended to ensure all complaints have the possibility of reaching the PDC for a final resolution. The current policy fails to address non-monetary grievances by contract lawyers. Because appellate defenders and contract lawyers are not unionized, we perceive a need to develop a grievance process which will allow reports of inequity or inefficiency to reach the Commission without being overly disruptive of the OPD chain of command. We will address this issue in the immediate future.

Hopefully, at our last meeting, Judge Singer and Mr. Jennings noted how very open we are to comment from staff or contract lawyers. Any perception that staff or contract lawyers should be afraid to air their grievances on a commission level is not well grounded

We anticipate our efforts will result in a minimal cost increase.

Recommendation No. 21: Special effort should be made to remove the fear of retaliation from management for publicly noting Agency problems.

We agree. We are not aware of any situation in which a complaining FTE or contract lawyer suffered retaliation from OPD management. If there is any truth to such an accusation, we wish to deal with this issue immediately. Again, if you are free to disclose sources or at least provide us with the number of complaints, we would appreciate it. As mentioned above, we have concerns that individuals reporting to you, protected by a guarantee of anonymity, had ulterior motives for making those complaints. As mentioned in our response to your previous recommendation, we will be attempting to refine our policies in such a fashion that will allow us to

address a *bona fide* complaint if an FTE or contract lawyer feels OPD management has treated him or her unjustly.

This is another area in which we have no expertise. If you are aware of language which might assist us, we would greatly appreciate your providing that language or directing us to individuals able to provide it.

Recommendation No. 22: The Commission must demand accountability from staff for implementing its promulgated standards and policies and for providing competent, efficient representation.

Recommendation No. 23: The Commission must be considerably more assertive in demanding relevant information from staff.

Recommendation No. 24: The Commission should also raise challenging questions and promote management into considering new options.

We have chosen to address these three issues jointly. For the most part, we agree with your recommendation that we must demand accountability. We do not agree, however, that we need to be more assertive in demanding relevant information. A better term might be “systematic.” In hindsight, we have failed to sometimes request or follow up on requests for information not by intention, but by oversight. One member has proposed and your author agrees we need to create a tracking/reporting system for Commission questions and requests, be more insistent on written responses, and be more diligent about posting that intercourse on the website. . This is a commission problem. We will cure it.

In the past, we have raised questions and requested information any time that compliance with our standards has come into question. Often that information has been provided by the OPD in verbal responses delivered at meetings. Many of the procedural requirements and obligations imposed upon staff and contract lawyers by our Standards were not imposed in county Public Defender offices. Over the years, we have heard frequent reports from OPD of their efforts and difficulties in overcoming the inertia inherent in implementing such a sea change in the way legal services are provided to the disenfranchised. On occasion, reports have also been made, with or without a request for anonymity, directly to Commission members.

We have asked the OPD to respond to those complaints. The OPD has been candid, competent and responsive in meeting our demands and answering our questions. While those responses have often been presented verbally at our meetings, the track record of the OPD has left the Commission very comfortable with those responses. As hard data has become increasingly available the OPD has volunteered that information or provided it upon request.

Finally, you raise provocative questions that we have failed to address. Frankly, we have not wondered how the staff will address the unexpected surge in the numbers of people arrested. In part, we have not done so because there has not been a history of that happening on a state level. While federal investigations and sting operations have occasionally spawned the arrest of a large number of individuals thereby taxing the resources of the Federal Defenders of Montana, significant surges in numbers of people arrested on a state level have only occurred in the context of sparsely populated counties where the usual rate of arrest is only minimal to start with. We may address this task, but do not consider it a high priority at this time. We certainly invite your comments on why our perception might be faulty.

Recommendation No. 25: The Commission should consider selecting a secretary from its own ranks or hiring a person for that job and not rely upon the Chief Defender to act as secretary to the Commission.

Currently, we do not agree with this recommendation. As mentioned above, we will be attempting to get a definitive answer whether our enabling legislation allows us to hire personnel. Our primary interest in making that inquiry, however, involves our quest to answer critical concerns raised by you and by individual Commission members regarding our current conflict of interest system.

In the meantime, we do not believe that the Commission's hiring of administrative personnel is cost effective. In many cases, as in preparing this response, the office staff of the individual Commissioners has provided unofficial support. In addition, OPD has been very responsive to our administrative needs. The common goals and work ethic shared by the OPD

and the PDC have allowed us to avoid any tension or conflicts that would dictate we hire independent staff.

Recommendation No. 26: The Commission should insist that definitive lines of authority be established, published and be included in job descriptions and be communicated to all staff.

We agree, but believe our compliance and that of OPD exceeds your perceptions. We have established a statutorily mandated organizational chart. If that has not been provided to you, we will do so. However, we do recognize that many of the policies currently implemented are informal. For instance, when someone is taking vacation, OPD reports delegation of authority is usually accomplished by emails prior to departure of that person. We will continue to study this issue. It may be that a more definitive written policy delineating the transfer of authority in the absence of any given manager or operational head would be a good idea.

We do not anticipate implementation of more a more formal delegation protocol will be more than minimally expensive.

Recommendation No. 27: The Commission should consider imposing its own limitations upon the private practice of law by a defender staff member at all levels of authority within the Defender Agency.

We disagree. We do not believe that we have the authority to enact such a policy. While the Montana Bar Association's ethics opinion is only advisory in nature, a Montana Supreme Court ruling controls our decision. In *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996), the Montana Supreme Court upheld a district court award of damages to a state employee alleging he had been wrongfully discharged. The court held a Department of Revenue rule which prohibited a Department real estate appraiser from seeking outside employment was unconstitutional. In doing so, the Court recognized that the opportunity to pursue employment was a fundamental right guaranteed under the Montana Constitution. The Court insisted any attempt to infringe upon that right would be strictly scrutinized. In the absence of a specific and justified compelling state interest, a state agency may not restrict outside employment.

This topic was a matter of considerable debate. Ultimately, we decided our actions were controlled by the Supreme Court=s ruling. So long as an OPD employee=s outside employment does not impede or impair job performance, we have no right to restrict an employee from seeking supplemental income in his or her off hours. If you feel that we have overlooked a compelling state interest which would justify our restriction on an employee=s private practice of law at times other than work hours, we would certainly entertain revisiting this issue

On the other hand, we did adopt a written *pro bono* policy consistent with that of other state agencies. That policy encourages *pro bono* work and allows minimal use of public resources and the ability to perform *pro bono* work on a limited basis during employment hours.

Recommendation No. 28: The commission should require a strategic plan from each region that, amount other things, results in measurable improvement in supervision, management, retrieval of information, and evaluation of staff.

In general, we agree. Only one member of the Commission has a background in Human Resources. Accordingly, we are reluctant to unilaterally dictate the manner in which your recommendation should be carried out. Very early on in this process we formed and adopted a strategic plan which provides how we will provide services accompanied by a financial plan. That plan sets forth certain goals and objectives and includes an organizational chart. We will seek the counsel of OPD=s Human Resource=s personnel on how to further refine and improve that strategic plan.

Recommendation No. 29: The Commission itself should evaluate and assess what statutory provisions have been adequately satisfied and where it has fallen short.

We agree. Our request that you undertake your independent evaluation of our performance to date is only our initial step in taking the time for introspection and soliciting third-party comment. Now that the

start-up process is nearly at an end and our informational flow at least satisfactory, it is important that we evaluate and assess our performance in terms of our enabling legislation and begin to immediately address any failure to satisfy our obligations. Beyond our own introspection and in response to your highly valuable assessment of the system, we will continue to seek comment from the administration, the legislature, legislative counsel, the OPD, our staff and contractor lawyers, the judiciary, and, if possible, our clients.

While we anticipate our costs will be only minimal in carrying out your recommendation, we are committed to spend whatever time is necessary now that we have the time to engage in the process.

Recommendation No. 30: Commission members and Agency management should be active in proclaiming the value of the Agency throughout the state and should speak to civic organizations, schools, and other community groups regarding the role which the Agency plays in the community.

We agree. Recognizing there are distinctions to be drawn between public relations and lobbying (an activity in which state agencies are generally prohibited from engaging), we will do our best to inform the administration, the legislature, civic organizations, educational institutions and the general public of the important role that an effective, functional public defender system plays. Historically, criminal defense lawyers have woefully failed in the area of public relations. In light of that fact, an even larger onus falls on us as an agency to educate interested parties. Our commitment is premised upon an underlying belief that this system is the only way to guarantee the protection of the most fundamental of rights afforded to citizens.

Again, our error in this area is one of omission rather than faulty judgment. We have been forced to focus on far more immediate tasks in order to get the system up and running as expeditiously and effectively as possible. In doing so, we have deferred, but not overlooked, addressing this very important task you have so astutely identified. It is important to note, however, that we believe we have been highly successful in the limited amount of education and promotion in which we have engaged. Our belief

was confirmed when your author met with the Governor=s budget director this week. Any objective individual familiar with our actions and achievements to date would conclude we have been candid, frugal, diligent, and dogged in our efforts to create a system which will serve as a model of how public defender services should be delivered.

We will give this recommendation a high priority. If you have any language from the policies of other systems which you think might assist us in implementing a public relations and educational protocol, we would greatly appreciate that language or being directed to someone who can provide it.

Recommendation No. 31: Investigative resources should be provided for misdemeanors as well as felonies.

We agree. Contrary to rumors or anonymous reports about lack of investigative resources being unavailable for misdemeanor cases, the OPD reports that it has not foreclosed the use of investigators in misdemeanor cases. Our system now provides a wealth of investigative resources only dreamed of in most former systems. Formerly, the hiring of an investigator often needed to be authorized by a judge. The judges proved to be very stingy when ruling on those motions. Only Yellowstone County office had a history of using in-house investigators. Accordingly, attorneys in that regional office have a sense that investigative resources are limited in comparison to the prior system. On the other hand, every other region is now enjoying investigative resources that exceed, by a wide margin, those available prior to the creation of this system.

If anyone would know, it would be you that resources for those who strive to provide a valuable public service are limited. It has often been said that no matter how large one builds a garage, one will fill it. This adage is also true with respect to investigators. No matter how much investigative capability our system has, we are confident it could be fully utilized. There is and probably always will be a need to set priorities on the use of investigative resources. OPD reports the manner in which investigative resources are utilized is generally a regional management decision. As a general rule, those managers give felonies a priority. OPD insists, however, this policy is not set in stone. We have asked OPD to provide memoranda, letters or e-

mails sent by OPD on this issue. They advise they will do so, but will require more time than this response allows.

Recommendation No. 32: All lawyers should have authority to use automated legal research engines when necessary.

To the extent you were informed that not all lawyers in the Public Defender program are authorized to use computerized research tools, we believe that you have been misinformed. All attorneys are authorized to use such services. Each FTE has assigned software. All contract lawyers are authorized to use it as well. In addition, we pay for Lexis services for fifty of our contract lawyers. Approximately, one and 2 years ago, we wanted to assist contract lawyers in obtaining research software at a reduced rate. We did so, in part, because we were unsuccessful in obtaining an increase in their hourly compensation. We were able to obtain a significant discount from Lexis for their hardware, but only in lots of 50 programs. We then asked contract lawyers to sign up if they had an interest. We prioritized the assignment of those first fifty licenses to those who did a significant amount of work for the system. Since that time we have continued to take names. OPD reports that there are approximately 15 contract lawyers who have indicated an interest but have not been provided Lexis at our expense because we need to wait for an additional 35 lawyers to sign up.

CONCLUSION

We have disputed some of your observations and findings based upon representations by OPD that your data is in error. As we have said repeatedly in the foregoing response, the OPD staff enjoys our fullest confidence. The Commission's faith in the candor and competence of the OPD has often meant that we have not demanded the production of documents or hard copies of data. This has been especially true when effort to producing information in a formal fashion would distract OPD resources and personnel from reaching our primary goal.

We recognize our response is not supported with documentation to support many positions taken by the Commission B positions which often stem from information provided by the OPD. If you feel the integrity of your work and your report requires the production of any documents, we

will immediately ask OPD to forward those to you. If you feel it would be more appropriate for you to make that request directly to OPD, you have our permission to do so.

We fully expect OPD will fully comply with any request in an expeditious manner. Neither OPD nor this Commission will consider any such request by you to be a negative reflection on our candor and competence. Instead, we would welcome the opportunity to provide you written documentation supporting our positions.

We recognize this response may be more substantive than you anticipated. Arguably, it may have been more appropriate to wait until your final report before providing such complete responses and commentaries. We found it very difficult, however, to draw a line between what might be considered factually or technically incorrect, and what might be substantively incorrect based on your lack of data, faulty data, or misperceptions. We decided it was better to error on the side of providing you with a response that was too broad rather than provide you with a pithy, reactive response in which we ran the risk of restricting what has proven to be a highly constructive dialogue. Ultimately, we defer to you. If you wish us to edit this response with the understanding that you would prefer substantive issues be addressed at a later date, we will do our very best to comply.

Again, thank you for your hard work and dedication. And, of course, thank you for taking the time to review this response. We look forward to your reply.

Sincerely yours,

Michael J. Sherwood, Chair
Montana State Public Defender Commission

C. (2) Study Team's Reply to the Commission's Response



AMERICAN UNIVERSITY

WASHINGTON, D.C.

SCHOOL OF PUBLIC AFFAIRS
JUSTICE PROGRAMS OFFICE

BJA Criminal Courts Technical Assistance Project: TA Report No. 4-072

**Assessment of the Initial Period of Operations of the Montana Statewide
Public Defender System**

*Study Team's Response to the Comments Submitted by the Montana Public Defender
Commission August 21, 2009 on the Draft Report Submitted by the Study Team*

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INTRODUCTORY COMMENT

We appreciate the thoroughness with which the Commission has reviewed the draft report and the commitment to use the report, evidenced in the Commission's response, as a "road map for moving the system toward the delivery of quality services for indigent defendants." We should state at the outset that, in conducting our review, our focus and objective has consistently been on providing Montana with sound recommendations for improving the state's public defender system based on our collective experiences and years of working in the development of state and local indigent defense service delivery systems. It is therefore not a question of "taking offense" at whether or not the Commission disagrees with some or all of our findings and recommendations. If there is good reason to disagree, we welcome the dialogue. However, in this situation, that does not appear to have been the case and we urge the Commission to reexamine those findings and recommendations with which it takes issue in light of the rationale provided in the report and the additional commentary we are providing in this response.

You indicate on page 2 of the Commission's response that "in order to expedite the process, we have not cited all your observations and findings we feel are in error or are no longer valid due to our rapidly evolving system....." and indicate that commentary on the status of the system in August 2009 compared with the situation in June 2009 when we completed our fact finding would require at least 30 days. Having received no indication of "observations and findings [you] feel are in error", we are not in a position to respond to that statement. However, we again urge that the findings and recommendations submitted in the report be reexamined. Such a reexamination should indicate that the issues we are talking about could not possibly be remedied within two months absent fundamental changes in management practices which we have no reason to believe have occurred.

You also suggest (page 3) that much of the findings upon which our report was based came from anecdotal information possibly provided by individuals with ulterior motives to discredit the "system" or the individuals involved. In these types of studies we always expect to receive negative comments from at least a few of the individuals we meet with. Having multiple perspectives reflected in these types of systemic assessments reinforces the balance and objectivity of the study. In the case of this review, however, the large number of individuals, representing a wide range of involvement with the system, who requested anonymity and who actually sought us out to provide perspective on the system, most of whom were deeply committed to its purposes and had worked in various capacities to promote its enactment and implementation, was unprecedented. We should also note that their comments were not simply anecdotal but invariably supported by factual information that we compiled and corroborated during the course of the study.

Your critique that we "have relied upon anecdotal information" raises further concerns. Only one aspect of our report relies upon anecdotal information. That section deals with the poor morale of many of your staff and K lawyers. Most of our report addresses failures to satisfy legislative provisions and directives, as well as failure to perform

according to Commission Standards and Policy. These are not based on anecdotal information.

We note, for example, that you are in the fourth year of operations. Yet you are unable to explain how you erred in the distribution of resources to regions; you do not have clear and unambiguous lines of authority (although you dispute that); you are unable to identify and control lawyer caseloads. Why are so many of your Standards and Policies not implemented? Most of our examination was a comparison of the Agency's statutory obligations, Standard and Policy mandated performance requirements with degree to which the Agency has complied. That is hardly anecdotal.

You have correctly observed that our report focuses on management and communication problems. Of course, the most important issue to be addressed is that of the quality of the representation provided to defender clients. That type of an evaluation is both beyond the resources of the BJA Criminal Courts Technical Assistance Project and was not the focus of the technical assistance requested – which was for an assessment of “how the system was working “ after its initial period of operation. Moreover, that type of an evaluation can only reasonably take place when the agency has a comprehensive information system in place. Indeed, that evaluation is the primary responsibility of management and is a constant, continuing process. While there are procedures to evaluate effectiveness and efficiency of defender performance, the agency's internal records are currently inadequate for this purpose.

RESPONSE TO COMMENTS REGARDING REPORT FINDINGS

First, we shall address your comments that are not referenced to recommendations.

1. Footnote 21 has been removed from the final draft, based upon your comments that there are three staff lawyers (presumably managers) qualified to represent clients confronting the death penalty.
2. Reporting the failure to increase the budget allowing a substantial increase in the K lawyer hourly rate, you state that “there is no blame to be assigned.” Perhaps! But how would you expect to motivate a responsible legislature to increase the budget for K lawyers without illustrating their necessity and value with concrete statistics? A state agency that is unable to advise and document its work, the clients they represented, the results of that representation, etc., cannot demand the respect of the Legislature. Legislatures have the duty to ask what you have done with the money they gave you. When the agency is unable to respond with documentation, the Legislature cannot be expected to blindly increase funding. Indeed, that kind of failure to provide adequate documentation jeopardizes the existence of the entire agency. It is akin to asking an investor to invest hard earned money in a business where the business is unable to disclose its production volume, its gross income, and its net profit and loss.

You also express dismay at the failure of K lawyers to support your budget requests at legislative hearings. Assuming they were requested to do so, why would you expect the K lawyers to support an agency where K lawyers believe they have been unfairly and unprofessionally treated in the review process of fee petitions and have not been provided with adequate support in their efforts for assigned clients? Is this failure not some evidence of the poor morale problem we identified? Simply stated: we do not agree with your conclusion that there is no blame to be assigned.

3. The \$60,000 bill referred to in your Response #3 response (p. 5) regarding the late payment issue is another example of your failure to focus on the underlying management responsibility which, if exercised, would have avoided the problem. You place entire fault on the billing lawyer. The Commission failed to ask the following questions of the Defender Director: Why was this lawyer assigned new cases if he/she was so tardy in billing on old cases? If the lawyer was not billing in a timely manner on older assigned cases, were progress reports received on the older assigned cases? If the failure to file timely fee petitions was so devastating to the budget, why did not management intercede and ask the court for authority to reassign the cases? You entirely ignore management responsibility for this problem.
4. The caseload standards you referred to (p. 6-7) with an apparent foundation in an NLADA publication had its origins in the report of the National Advisory Commission on Criminal Justice Standards and Goals, 1973 (NAC). That was a U.S. Department of Justice funded project. The NAC commentary pointed to the weaknesses and shortcomings of their caseload standards and in the context of this defender agency we would not recommend them to you, primarily because their system is dependent upon the defender agency's having concrete evidence of its effectiveness.

What you ignore is that you mandated that "all attorney staff shall maintain work time for each case...assigned..." to be "report(ed)...on each case biweekly...in increments of 0.1 of an hour..." Policy 120, effective 7-1-06. When, during the course of our study, we pointed out that this policy has been ignored, your response was that it is difficult to induce staff lawyers to record their time. Obviously, such records would provide a concrete foundation for caseload limitations. Lawyers in private practice frequently are paid according to time. Hence, it is not unusual to require lawyers to maintain time records. That record keeping is neither difficult nor time consuming.

Your Agency's failure to maintain the required time records is simply a failure of management to properly supervise, i.e. to monitor case progress. It is a relatively simple management procedure. If management cannot implement that simple task, how is management going to accumulate the information for caseload and progress control through the computer system? Why does the Board not question this management failure? Would those time records have

not been a valuable tool for enforcing caseload standards? These are serious management failures which require prompt remedies.

We will now turn to your response to our recommendations.

Recommendation 1: Data Collection

You express agreement with the recommendation. You also state that “only in the last month or so has OPD been able to generate most of the ...information because its software system was still being developed and refined by the vendor.” The obvious question is why did it take so long? The next question is why did not staff prepare these essential reports by hand, the way it was historically done, and still is done, without computers? But most important is that computer utilization is a two stage process, namely, generating relevant information from the computer and collecting the information from the source for computerized analysis. From what we have observed, the agency still remains without the ability to collect the data or information for the computer. This problem entirely defeats the usefulness of any computerized system. All staff effort to compile statistics is directed to the computer system. The most advanced, sophisticated computer, however, cannot extract information from the air. We saw no indication that the type of information needed to provide useful, computer generated data, is being collected. Management has appeared to show no inclination to develop the type of information system that is needed or to guide the collection of essential individual case progress and closing information upon which it needs to be based.

Recommendations 2 and 3: Case weighting System and System to evaluate attorney work

Our draft report as well as our introductory comments here requires no further commentary.

Recommendation 4: Budget Submissions

You state that you must submit your budget for the next biennium by May 2010 and by then “will now be able to provide far more information....” We earnestly hope so. To be entirely candid, we are not optimistic that the “more information” will be reported. Our pessimism arises from the lack of any indication that the Agency is developing the capability to collect relative data and management’s disinterest in performing management and supervision functions necessary for collecting relevant data.

Recommendation 5: Management Caseload

Although you agree in part with our recommendation, you note the disagreement of Ms. Hood and the purported desire of other managers to assume caseloads. It should be noted that the Defender enabling statute requires that the Commission determine “the chief defender(s) minimum client caseload” (as well as that of the deputy defenders) 47-1-202

(11). Until the statutory caseload provision is entirely eliminated, that caseload should be one case a year and no more.

The point is that the management function is substantially ignored. Much of your response reveals that fact. Yet that function is an essential element in a defender agency, particularly one so diverse and so widely dispersed as Montana's. Giving guidance to staff should be the primary duty of the manager. Attention to clients takes time and an undivided involvement of the lawyer.

A major reason given for not performing legislatively and Commission imposed objectives and standard and policy requirements has been lack of time. Yet the Commission has failed to impose caseload restrictions which would allow more time for performance of management functions. If managers prefer representing clients, they should be heartily encouraged to do so, but then also take a staff lawyer position. If a person occupies a manager's position or serves as the director or deputy director, their primary function needs to be to guide, manage and direct. Future operations of the Agency are in jeopardy because without documentation of Agency performance, it is unlikely that the Agency will be adequately funded, if funded at all. It would be irresponsible for a legislature to fund an agency which cannot accurately document its work.

Recommendation 6: Relates to the Commission's Failure to Supervise

The Commission has indicated it is satisfied with the information provided by the defender director. In light of the failures we addressed, we believe this satisfaction is unwarranted.

Recommendations 7, 8, 9, 10: Conflicts Office; Training Director's functions;

You indicate you are in agreement with our recommendations. We have no further comment to add to the Report commentary.

Recommendation 11: Attorney Evaluations

We disagree with your claim that "Compliance [with the mandate to evaluate all lawyers yearly] will result in significant expense." Evaluation should be continuous and an essential part of management responsibility. Attorney case files should contain case progress summaries and copies of submitted motions, memorandum of law, etc. Completing case closing documents summarizing case results and how results were achieved should be a normal process of closing a case. Supervisors should review the files periodically to assure that pertinent information is recorded and that the case is progressing. Supervisors should periodically have case conferences with lawyers individually to assist staff in developing and applying the defense theory of the case and to brainstorm pretrial and trial and disposition issues, and like matters. Your information retrieval system should indicate potential problems.

Guidance should be in the context of assisting lawyers to develop professionally as well as out of concern for client representation. In short, evaluations are an integral part of responsible supervision. At the end of each year it would then be a relatively easy task and take a short time to prepare a written evaluation report. A final evaluation summary should be discussed with the lawyer, then delivered to the deputy defender where appropriate and the defender director for her review and a copy placed in the lawyer's personnel file.

It is managing that is time consuming. Evaluations are neither difficult nor time consuming and do not add any additional expense, if there has been proper supervision.

Recommendation 12: Evaluation of K lawyers

It should not be assumed that an inclusive, thorough "memorandum of understanding" between the Defender Agency and the K lawyer will solve all your K lawyer supervision problems. Similar to the evaluation of staff lawyers, evaluation of K lawyers should be continuous with the fee petitions as the first line of critical examination, culminating with an adequate case closing report. It should also include the theory of the case and case process conferences between the K lawyer and whoever in management is responsible for K lawyer performance. Despite your representation that your table of organization is clear and definitive, we cannot determine if the K manager or the deputy directors have the principal responsibility of supervising K lawyers.

Of course, there are other problems unique to the K lawyer. But like the staff lawyer evaluation, K lawyer evaluations should be part of the continuing guidance and monitoring process.

Recommendation 13: Assigned clients becoming fee clients

You indicate agreement with our recommendation. No further comment appears necessary.

Recommendation 14: Early Entry into the Case

At the outset, we point out that entry into a case at the start of the police investigation and before the client appears in court is the Commission standard. If compliance "would be...fiscally irresponsible," why have the Standard? See Standard III 2A.

Aside from the Montana Commission standard, we also call your attention to Escabedo v. Illinois 378 U.S. 478, Miranda v. Arizona 384 U.S. 469 (1980), and cases of its progeny. Also, examine Rothgery v. Gillespie County 128 S. Ct. 2578 (2008). You should also see ABA, Ten Principles of a Public Defender System, Principle 3 (2002) and consider the issue in the context of Riverside v. McLaughlin, 500 U.S. 44 (1991). Early entry into a case by a defense lawyer is generally accepted as important. It is neither exotic nor unnecessary.

Your concern about extraordinary expense is unwarranted. You should examine the backup call systems of physicians when addressing the needs of emergency medical attention. Simply because an identified lawyer is available to respond to an arrest does not mean the lawyer is paid to be on call. Until called, the lawyer is free to go about his/her own business. If and when called, the time spent on the case must be compensated, but all that means is that the lawyer is doing work that is required earlier rather than later; hence, there is no increase in expense by doing that same work earlier.

Indeed, because the lawyer enters a case immediately, time in pretrial investigation may be reduced, thus achieving fiscal savings. Also, entry in the case before the formal charge presents the opportunity to negotiate out the case before the formal charge is filed, at a considerable savings for all criminal justice agencies, including the Defender.

In short, the process is fiscally responsible. Rather than adding cost, it will reduce cost. More important, the likelihood of effective representation is substantially enhanced.

We hope that you will not underestimate the value of your own standard. Your objection appears to be not based upon an understanding of the importance of early case entry but, rather upon valuing non existing financial constraints over effective representation.

Recommendations 15 and 16: Case Overloads

The commentary in our report fully addresses these issues.

Recommendation 17: Budgeting for 2012 – 2013

The only further comment we make is to note that you are in your fourth year of existence and you still do not have an information retrieval and reporting system. You are without a system to gather the information to be given to JUSTWARE. The body of our draft report suggested how to solve this problem. For the reasons discussed elsewhere in our report and this response, we question your prediction that you will be able to describe and calculate caseload by the purported deadline of May, 2010, for appropriation request submission.

You also state: “OPD will continue to monitor caseloads on a monthly basis” (p. 28). Our study team asked for monthly caseload records. We were never provided with month by month caseload data for individual staff attorneys. Indeed, we believe the agency does not have the capability to efficiently and effectively monitor caseloads. If the agency now has that capability, you have made truly remarkable progress since our team left Montana.

Recommendation 19: Communication with Staff

We believe the commentary in the report fully addresses these issues.

Recommendation 20: Addresses the Distribution of Resources to Regions

You claim that the “Billings” case counts were substantially inflated” because of the way their lower courts counted cases. But how would an undiscovered higher case count cause the region to receive less funding than warranted? If anything, the “inflated” case count would have resulted in disproportionately excess funding.

But in any event, why do you rely upon a court’s case count when not all court cases are defender cases? Reliance should be based upon the count of cases in your office. Your explanation for the uneven distribution is, in a word, unreasonable. Also troubling is the Commission’s failure to even question this patently unreasonable explanation.

Recommendation 21: Addresses the Staff Fear of Management Retaliation

You have pointed to your grievance procedure which apparently has not been used by the complaining staff. We would observe that it may be that staff is without confidence in a complaint process to a board that does not enforce its own standards and policies and has unshakeable confidence in management although there are glaring and substantial management deficiencies. You even now attribute staff complaints to a few malcontents, although never seriously question management about the numerous problems that persist. In that context, how can staff have confidence in your grievance procedure?

You ask for our sources for information of low morale and the fear of retaliation, implying disbelief. Of course, we cannot disclose sources for the very reason the recommendation is presented. Our investigatory procedures, including the number of interviews, were explained in our draft report.

Recommendations 22 – 25: Commission’s role re staff accountability; management performance; independent secretarial services.

We will address these issues in our conclusion below.

Recommendation 26: Relates to Definitive Lines of Authority

Your response to our conclusion that management has failed to fully delineate lines of authority was that the agency has an “organizational chart” that “exceeds[our] perception.” We emphatically disagree. After several requests we finally received from agency staff several pages of what was represented as a chart of staff organization. We examined that material. We continue to insist that the chart does not include important lines of authority, as we explained in our commentary to this recommendation is needed.

Recommendation 27: Relates to Limitations on Private Practice by Staff

You disagree with our recommendation stating that you are without authority to impose any limitation. You cite Wadsworth v. State. That case imposes only a qualified limitation, not an absolute one. Of course, even public employees cannot have imposed upon them by the employer limitations unrelated to their employment. The test for any

restriction on off-time activities usually contains the following two elements: (1) the restriction must protect a public interest the agency is assigned to protect; (2) the restriction must reasonably be expected to protect that public interest.

Examples of staff lawyer practice restrictions in defender offices that would satisfy this test, we suggest, would include: Staff lawyers may not attempt to induce assigned clients to become a private fee client; staff lawyers may not accept as a fee client an unrelated criminal case where the assigned client is also a defendant; staff lawyers may not accept any civil case of the assigned client or a close relative of the client for the duration of the pendency of the assigned client's criminal case. These are merely some examples of what are reasonable and necessary private practice limitations. Imposing such limitations is recommended to deter staff conduct that would convey the impression that staff lawyers would not be motivated to vigorously defend the assigned case for a client who does not directly or indirectly add his/her own compensation to the lawyer.

Recommendation 28: Relating to Strategic Planning

One of the problems we observed is that, although policy and standards of the Commission set out worthy goals or objectives, implementation is not enforced, or in some respects totally ignored. The same issue arises with a number of the requirements in the defender enabling legislation. Tasks must be identified and defined, and specific time limits for performance established by the Commission. Interim progress as well as final reports, fully verified, must be received by the Commission. Where there is failure or delay, explanations that are reasonable and supportable must be demanded. It is the responsibility of the Board to assure that those tasks are completed competently and timely.

The authority and responsibility of the Board must not be confused with staff responsibility. The Commission must not be reticent in fulfilling its obligation. The Board must not become an apologist for the failures of the staff. This does not mean that the Board and staff are antagonists. But the Board must maintain a respectful distance from staff. Where staff and management performance is in compliance, there should be praise and full support. Where objectives are not achieved and failure continues, the Board must take appropriate action, not merely make excuses or lay blame elsewhere. Management must be held accountable, not systematically excused and failures condoned.

Recommendations 29, 30: Commission Functions

We have addressed these issues in the report. No further comment is deemed necessary.

Recommendation 31: Relates to Investigative Resources in Misdemeanor Cases.

You state, "Contrary to rumors or anonymous reports... OPD reports it has not foreclosed use of investigators in misdemeanor cases" (p. 37). However, this response begs the question. You do concede that "priority" is given to felony cases in the use of investigators. A delay in providing investigators in misdemeanor cases because of the

“priority” operates as a de-facto denial of investigators for misdemeanors. In short, the complaint appears valid despite “OPD’s report.” Once again you present an oral representation without any supporting documentation. Surely management keeps track of investigative requests and reports of performance by investigators. In the recent past how many misdemeanor cases out of the total of misdemeanor cases received the assistance of an investigator?

Recommendation 32: Access to Automated Legal Research

No further commentary is deemed necessary to supplement that in the report.

CONCLUSION

One of the difficulties in executing this Technical Assistance review arises from the fact that the Commission chairperson, who requested this technical assistance, left his position, indeed left the country before our review could be conducted. He, however, apparently observed agency problems. Since submitting the request for this technical assistance study, there have been two successor Commission chairpersons appointed. We are not clear from our various communications as to whether these successor chairs are in agreement as to the need for this examination and may, perhaps, be more sympathetic with agency management while still committed to wanting the program to work. This perception is based, in part, by the Commission’s critique of the study team’s reference to the agency’s chief defender by name, purportedly for privacy reasons, when study team representatives appeared before the Commission at the July 2009 meeting to discuss the draft report.

This critique is patently absurd. The Public Defender Agency is a public body, supported by taxpayers. Surely the identity of the chief executive officer is in the public domain. The July meeting to discuss the report was a public meeting, and the report was or will become a public document. The public has the obvious right to know how their servants are performing. While this is therefore a silly issue, it does illustrate the attempt at distractions to avoid addressing the series of fundamental questions raised in the report.

Rather than insisting on solutions to problems, too often the Commission accepts explanations that are unreasonable or lays blame on alleged uncontrollable circumstances or other people. For example, K lawyers did not appear at legislative sessions in support of staff efforts to raise the hourly rate; Managers cannot control caseloads because staff fails to report dispositions; the computer system, i.e. JUSTWARE, is not providing the needed information: managers are not at fault for the \$60,000 K lawyer bill; it is irresponsibly expensive to provide early representation to clients; a few perennial malcontents are the source of complaints; management staff is too busy (representing their own clients) to provide proper guidance to staff, and so on. Rather than questioning these explanations, Commissioners appear to protect management rather than attempt to motivate performance.

The Agency appears to be substantially under funded. But as this now stands, blame for that should not be placed on the economy or legislature parsimony. Simply stated, management has not made a convincing case for adequate funding. No concrete evidence that the Defender Agency is efficiently representing clients has been presented, although it may well be the case. Without answers to these questions, a responsible legislature would be remiss to generously fund the Agency, or even fund it at all.

Of course, the Commission should provide support for the agency when the agency is performing effectively. But the other side of the coin is that the Commission must act to insure effective, efficient performance, not simply ignore, excuse, or apologize for non performance.

The Commission's responsibility is to motivate and supervise. Staff's responsibility is to perform. When staff performs up to expectations, Commissioners should support management. When staff fails to perform consistent with expectations, the Commission has the responsibility to cause staff to improve. We have included as an Appendix (Appendix D) to the final report an article on the role of governing boards which we hope will be useful to the Commission as it considers our various recommendations relevant to its role.

For all the reasons stated in our report, there is, we believe, a realistic danger that the Defender Agency will descend into a guilty plea mill, simply processing cases to get rid of them instead of vigorously defending their clients. It is the Agency's responsibility to prove that is not the case.